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Confronting The Consolidation Conundrum

Richard L. Marcus*

I. INTRODUCTION

"Rule Forty-two. *All persons more than a mile high to leave the court.*"

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule; you've invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.¹

Perhaps Rule 42 of the Federal Rules of Civil Procedure—dealing with consolidation of cases and severance of issues for trial—should be number one. At least it has become considerably more important in recent years as courts have increasingly sought to use the power to consolidate and sever to design cures for the stresses of modern multiple litigation.² There can be no doubt that the American Law Institute's Complex Litigation Project has thrust consolidation

* Professor of Law, University of California, Hastings College of the Law. I was a member of the Members' Consultative Group of the American Law Institute that commented on the ALI Complex Litigation Project. I was also Associate Reporter to the Federal Courts Study Committee, whose recommendations regarding consolidation are discussed in this Article. *See infra* text accompanying notes 88-89. The views expressed in this Article are mine alone. I would like to thank Ed Brunet, Mary Kay Kane, Tom Rowe and Joan Steinman who read a draft of this Article and offered comments. I am indebted for research assistance to Sarah Colby and Hasan Shafiqullah, members of the Hastings class of 1997.

1. LEWIS CARROLL, *ALICE IN WONDERLAND* 132 (1986).

2. "Due largely to caseload pressures, the federal courts are consolidating increasing numbers of cases . . ." Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 718 (1995). Unfortunately, exact figures are not available. "[T]he Administrative Office of the United States Courts has not gathered statistics on the number of cases consolidated pursuant to [Rule 42]." *Id.* at 718 n.1.

center stage. Although it canvassed a variety of procedural devices for dealing with the challenges of complex litigation, including party joinder under Rules 19 and 20,³ intervention pursuant to Rule 24,⁴ class actions,⁵ interpleader,⁶ and bankruptcy,⁷ the Project's principal thrust was to remove obstacles to consolidation.

For the ALI Project, consolidation is Rule 1, although it is hard to predict the impact of the Project's proposals on the law. The Project has already been criticized by academics for trying to do too much and for failing to do enough. One professor has lambasted it because it "fails to deal in a holistic fashion with the interrelated consequences of complex cases," thus leaving too much undone.⁸ Another reacts that the framers of the Project sought to "use the occasion of complex litigation reform to overhaul as much of the law of American civil procedure as possible," and describes a number of the Project's proposals as "sweeping" and "radical."⁹

Under these circumstances, the prospects for quick adoption by Congress of the Project's statutory proposals appear small. Indeed, much less ambitious statutory initiatives have been introduced in Congress, but have not been adopted.¹⁰ Logically, if not politically, a central concern for Congress should be the Project's treatment of consolidation; unless consolidation is suited to the task of harnessing complex litigation, there would seem to be little reason to embrace other procedural reforms—be they aggressive or incomplete—to increase opportunities for consolidation.

3. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 24-26 (1994) [hereinafter COMPLEX LITIGATION PROPOSAL].

4. See *id.* at 26-27.

5. See *id.* at 27-34.

6. See *id.* at 34-35.

7. See *id.* at 35-36.

8. Linda S. Mullinex, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 979 (1994).

9. Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139, 1143-44 (1994).

10. See H.R. 3406, 101st Cong., 1st Sess. (1989); H.R. 4807, 100th Cong., 2d Sess. (1988); H.R. 3152, 100th Cong., 1st Sess. (1987); H.R. 4315, 99th Cong., 2d Sess. (1986); H.R. 3690, 98th Cong., 1st Sess. (1983). H.R. 3406 passed the House of Representatives without opposition, but the Senate did not act on it. For a review of the legislative process of these proposals, including analysis of the fate of H.R. 3406 and attention to the role of academic commentary, see Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401 (1991).

This Article therefore focuses on consolidation itself, emphasizing the use of consolidation for combined disposition, which is a principal objective of the Project.¹¹ The Article builds on Professor Steinman's recent and very substantial work on the implications of consolidation and examines the standards and methods for deciding whether cases should be consolidated, a topic which she did not address.¹² As Professor Steinman's work has revealed, consolidation presents a conundrum which surfaces in a number of jurisdictional and jurisdiction-related procedural puzzles. Whether consolidation should be employed in complex litigation seems the central question, but it has been little examined in the literature. The Complex Litigation Project provides a careful examination of the propriety and methods of consolidation. Evaluating the adequacy of this treatment thus provides the means through which this Article

11. Consolidation pursuant to Rule 42 can be solely for pretrial purposes and, pursuant to 28 U.S.C. § 1407 (1988), transfer and consolidation are supposed to be limited to such purposes. The reality, however, is that consolidation that is initially designated "pretrial" is often never unscrambled because there is a global settlement, because the consolidated cases are resolved by pretrial motion, or because the cases are later formally consolidated for trial. For a thorough exploration of these realities and their ramifications, see Steinman, *supra* note 2.

Whatever the present reality, it is evident that the thrust of the ALI Project is to facilitate consolidation for disposition of the actions, whether by settlement, pretrial ruling, or trial. A by-product of this effort may be severance of cases into constituent parts, such as liability and damages, and resolution of only some issues on a consolidated basis. See *infra* text accompanying notes 68-83, 177-206. But that does not change the basic thrust toward consolidated resolution. Some are quite overt about this objective:

As somebody who has been involved in these mass torts over the last twelve years on a regular basis, I want to make an additional point. What is the single most important feature of these mass torts in terms of getting them resolved? What ultimate issue holds the key to the resolution of these claims in an efficient way? The answer is aggregation. Aggregation. You must get all of the cases in one forum. Until you do that, any piecemeal solution, however beneficial it may be, does not offer either the plaintiff or the defendant global peace.

Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1647, 1648 (1995).

Consolidation for trial or other resolution is therefore the focus of this Article. Accordingly, the cautions about consolidation in this Article may not apply to coordinating discovery to avoid duplication of effort.

12. See Steinman, *supra* note 2, at 720 & n.10; see also Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967 (1995).

will address the question whether consolidation should be used in complex litigation.

To put the question in context, the Article begins in Part II with a review of the evolution of consolidation, stressing its increasing importance. Part III identifies the sometimes troubling implications consolidation has for the parties and the court, finding reason for the Federal Courts Study Committee's 1990 call for more detailed guidelines for the use of this technique. Part IV then forms the heart of the analysis by examining the Project's treatment of consolidation criteria, concluding that the Project impressively illuminates the issues but should be fortified by adoption of standards for consolidation that fully parallel those for common question class actions. Part IV also evaluates both the Project's reliance on a newly created Complex Litigation Panel to make the initial decision whether to consolidate, and its propulsion toward fragmenting cases by severance. Finally, Part IV reflects on the questions that will be before Congress should the Project's proposals be introduced there. The Article then turns in Part V to brief reflections on ways the Project's treatment of consolidation could be employed by courts under current statutory arrangements. It concludes with the hope that the Project's work on consolidation will be used by courts even if the proposal's menu of jurisdictional and choice of law changes fostering consolidation languishes unenacted.

II. CONSOLIDATION AS A SLEEPING GIANT

Consolidation has been around for a long time. Introduced in England in the eighteenth century by Lord Mansfield,¹³ it was first authorized in the federal courts in this country by a statute adopted in 1813.¹⁴ According to Professor Meador,

13. See *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 292 (1892) (explaining that Lord Mansfield introduced the consolidation rule to "avoid the expense and delay attending the trial of a multiplicity of actions upon the same question").

14. Act of July 22, 1813 § 3, 3 Stat. ch. 14. The statute provided in pertinent part:

[W]henever causes of like nature, or relative to the same question shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable.

consolidation for trial was "[o]ne of the earliest examples of case management based on inherent authority," and it was viewed in American jurisprudence as "an inseparable aspect of the powers possessed by common-law and equity courts."¹⁵

Mindful of the risks of comparing joinder attitudes of the 19th century with those of the present,¹⁶ one can comfortably conclude that consolidation initially served largely as an antidote to strict limitations on joinder that precluded combination in a single suit even of closely related claims. One example is the Supreme Court's 1892 decision in *Mutual Life Insurance Co. v. Hillmon*,¹⁷ a case familiar to generations of law students for its rule on hearsay evidence,¹⁸ which involved separate suits against three insurance companies based on separate life insurance policies issued on the life of the same man.¹⁹ Each insurance company denied that the man was dead, and the trial court consolidated the three cases for trial of that question even though plaintiff could not have joined all companies in a single suit under prevailing joinder rules.²⁰ Under current joinder notions, of course, the combination of these three claims in a single lawsuit would be unexceptional. Defendants contended on appeal that the combination of the cases was improper because the actions did not relate to the same question, but the Court refused to interfere with the trial judge's conclusion that a combined trial would avoid unnecessary delay and expense.²¹ In a 1933 case, the Court

This statute, and its successors, remained on the books until 1948, although effectively superseded by Rule 42 in 1938. See Gregory R. Harris, Note, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and Section 1404(a)*, 22 HASTINGS L.J. 1289, 1290 n.6 (1971).

15. Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1807 (1995).

16. See generally Robert Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989) (cautioning against the assumption that 19th century proceduralists embraced the same attitude toward joinder as the Federal Rules of Civil Procedure).

17. 145 U.S. 285 (1892).

18. *Hillmon* probably appears as a principal case in every American evidence casebook. When the Federal Rules of Evidence were adopted in 1974, it was so widely recognized that the Advisory Committee Notes to Rule 803(3) satisfied themselves with the comment that "[t]he rule of *Mutual Life Ins. Co. v. Hillmon* allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." FED. R. EVID. 803(3) advisory committee's note.

19. *Hillmon*, 145 U.S. at 285-86.

20. *Id.* at 286.

21. *Id.* at 289-92. The Court went on to reverse the judgment for plaintiff

added that "consolidation is permitted as a matter of convenience and economy in administration."²²

Rule 42 carried forward this flexible approach to joinder, building in part on experience in some state court systems.²³ Rule 42 is said to go beyond even the broad initial party joinder opportunities afforded by Rule 20.²⁴ The courts, however, have sometimes been circumspect in taking advantage of Rule 42's potentially wide scope of combination.²⁵ For some time,

due to the trial judge's limitation on defendant's peremptory challenges, and then volunteered its answer to the evidence question that has transfixed evidence scholars by holding that the insurance companies should be allowed to offer letters written by another man in support of their claim that the dead body that had been found was really his. The letters indicated that their author intended to accompany plaintiff's alleged decedent on the trip that allegedly led to his death. Plaintiff had objected to introduction of these letters on hearsay grounds, but the Court held that they could nevertheless be admitted to prove that the author acted as the letters said he intended to act. *Id.* at 295-300.

22. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496 (1933). In *Johnson*, the Court said that the consolidation of cases does not "merge the suits into a single cause." *Id.* at 496-97; see also Steinman, *supra* notes 2 and 12 (discussing these issues in more detail). The statement caused much uncertainty that remains unresolved.

In reality, the situation in *Johnson* was so peculiar that it does not seem to justify generalization. The problem in *Johnson* seems to have developed from a disagreement between Judge Martin Manton of the Second Circuit and the judges of the Southern District of New York about which trust company to appoint in receivership situations. Relying on a statute that allowed the senior circuit judge to assign a judge to serve on a district court, Judge Manton assigned himself to sit on the district court, had an action involving the Manhattan Railway Co. filed before him, and promptly appointed a trustee. Johnson later filed a second action, which was assigned to a district judge in the normal course. The district judge appointed a different trustee and invalidated Judge Manton's order of appointment, declaring that he was consolidating the two cases. The Supreme Court held the district judge's order invalid because the district judge did not acquire authority over Judge Manton's case by declaring it consolidated with the case the judge was presiding over. The basic difficulty was thus a problem of case assignment, not consolidation; had Judge Manton's case been assigned to the district judge he could have revoked the earlier order whether or not the two cases were consolidated.

23. See FED. R. CIV. P. 42 advisory committee's notes (stating that the rule's provisions are comparable to those adopted in Arkansas, California, New Mexico, and New York).

24. "[I]t would be a mistake to assume that the standard for consolidation is the same as that governing the original joinder of parties or claims." 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2382, at 432 (2d ed. 1994).

25. For example, in *Clark v. Elgin*, 25 F.R.D. 248 (N.D. Ohio 1960), four suits arising from a single auto accident were consolidated, but the court declined to combine them with a fifth arising out of the same accident because it involved an issue of contributory negligence. Under Rule 20, joinder of these claims in a single suit would of course have been permissible since all arose out of the same occurrence.

consolidation was only a sporadic event, and not a device the courts viewed as useful in combating caseload pressures. Thus, when conferences were convened in the 1950s to examine ways to deal with protracted litigation,²⁶ no substantial consideration was given to consolidation as such a technique. But the problem of the repetitious suit was not far off.

By the 1960s consolidation began to play a more prominent role in some types of cases. Confronted with some 2,000 private actions nationwide resulting from the electrical equipment price-fixing conspiracy, Chief Justice Warren appointed an ad hoc committee of judges to provide consistent treatment of discovery in these cases. Although not precisely consolidation, this was a move in that direction. The experience was sufficiently successful to prompt Congress in 1968 to create the Judicial Panel on Multidistrict Litigation. Congress granted the panel newly created authority to transfer cases pending in a variety of federal courts for coordinated or consolidated pretrial treatment.²⁷

Within a few years, it became widely recognized that even though this type of transfer was supposed to be limited to pretrial handling of cases, it usually shifted final responsibility for the cases to the court presiding over the consolidated proceedings, in part because transferee judges frequently used 28 U.S.C. § 1404(a) to obtain authority to transfer for all purposes, including trial.²⁸ Widespread use of transfer provisions thus paved the way for consolidated treatment of significant numbers of antitrust and securities fraud suits.

It has been in tort litigation, however, that consolidation has played its most prominent role in recent years. As early as 1963, a prescient student comment focused on the role of

26. See *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges Held at N.Y.U. Law Center, Aug. 26-30, 1957*, 21 F.R.D. 395; *Proceedings on the Seminar on Protracted Cases for United States Judges Held at Stan. L. Sch., Aug. 25-30, 1958*, 23 F.R.D. 319.

27. 28 U.S.C. § 1407(a).

28. John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 589 (1972) ("[T]ransfer for the limited purpose of pretrial proceedings has become functionally equivalent to transfer for all purposes, including trial on substantive legal issues."). This does not mean that transfer for pretrial purposes could not have such effects absent a later follow-up transfer under § 1404(a). Section 1407 only requires re-transfer for trial, and most cases (including those transferred pursuant to § 1407) don't reach trial. Thus, many cases would be concluded by settlement or dispositive pretrial motions after a § 1407 transfer even without the subsequent § 1404(a) transfer.

consolidation in mass tort cases.²⁹ Under the Multidistrict Litigation Act, transfer and consolidation were often used in mass disaster cases arising out of airplane crashes and hotel fires, and these techniques have also become popular in more dispersed tort cases involving exposure to allegedly toxic substances. The popularity of transfer and consolidation in mass tort cases has, in part, been due to the siege mentality that has gained currency in the judiciary.³⁰ As judges chafed at some of the prerequisites and limitations of class actions in mass tort cases,³¹ the consolidation avenue became more attractive.³² For example, District Judge Robert Parker of Texas, who had a large docket of asbestos cases, experimented with both consolidation and class action treatment in handling this docket. Eventually, as reported by Professor Mullenix, he became "indifferent as to whether to conduct [his pending asbestos cases] as a Rule 42 consolidation or as a Rule 23 class action."³³ Probably the most aggressive use of the

29. Comment, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373 (1963).

30. See Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 493 (1991) (referring to "the mass-tort litigation that has placed the courts under siege").

31. See generally Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

32. Mining the interaction between class actions and consolidations, courts can use consolidation to capture the claims of class members who opt out of Rule 23(b)(3) class actions. See, e.g., *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1349 (5th Cir. 1981) ("The district judge . . . was, and perhaps still is, contemplating consolidation of all the opt-out cases for trial . . ."); *Lailhengue v. Mobil Oil Corp.*, 775 F. Supp. 908, 914 n.8 (E.D. La. 1991) ("Any opt-out plaintiffs would be consolidated with the class under Federal Rule of Civil Procedure Rule 42(a) for trial on punitive damages."); *Eastern Brewing Corp. v. Owens-Illinois, Inc.*, 1989 WL 158752 (N.D. Ill. 1989) (class action and four similar actions brought by opt-out plaintiffs consolidated); MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.631 (1985) ("Class actions may be consolidated with cases instituted by opt-outs or others.") [hereinafter MANUAL, SECOND]; WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 183 (1982) ("Individual actions ancillary to the class action should be managed so as to minimize duplication of activity. Consolidating them with the main action for pretrial and trial reduces such duplication of effort.").

The MANUAL FOR COMPLEX LITIGATION, THIRD, continues to recognize the power to consolidate the cases of opt-out plaintiffs, but cautions:

Care should be taken in such situations to ensure that counsel for the parties in the nonclass actions are given a fair opportunity to participate in the presentation of evidence and arguments at trial, particularly when their clients are particularly affected.

MANUAL FOR COMPLEX LITIGATION, THIRD, § 21.631 (1995) [hereinafter MANUAL, THIRD].

33. Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in*

consolidation power occurred in 1991, when the Multidistrict Litigation Panel transferred over 26,000 asbestos personal injury cases to a single district judge in hopes he could apply "a new, streamlined approach" to them.³⁴ Recognizing the increased use of consolidation, Professor Resnik, in her comprehensive 1991 study of tendencies toward aggregation of litigation, concluded that "class actions are a visible but probably not dominant form of aggregation."³⁵

III. MISGIVINGS ABOUT CONSOLIDATION

Consolidation holds out a bland, somewhat technocratic, uncontroversial face to the world. Thus, as she worked on her study of procedural implications of consolidation, Professor Steinman was struck by the widespread belief of legal professionals that consolidation would not affect the rights of litigants.³⁶ But courts are beginning to notice that the reality of consolidation, particularly in mass tort cases, sometimes has very substantial effects on those rights. As the Second Circuit cautioned in upholding a consolidation order in 1992, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause

Asbestos Mass Tort Litigation, 32 WM. & MARY L. REV. 475, 504 (1991); see also *id.* at 489 (reporting that earlier Judge Parker had "believed he had reached the maximum consolidation feasible" with consolidated trials of 30 plaintiffs).

34. *In re Asbestos Prod. Liab. Litig.* (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991). The Panel had previously refused to transfer asbestos cases on the ground that they did not present common questions. *In re Asbestos & Asbestos Insulation Material Prod. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977). In 1991, it explained that developments since 1977 promoted the difference in outcome: "[W]e are persuaded that this litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice" 771 F. Supp. at 418. Recognizing the potential drawbacks of consolidation, however, it assured claimants that the transfer would not "result in their actions entering some black hole, never to be seen again." *Id.* at 423 n.10.

35. Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 22; see also Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991).

36. As Professor Steinman explains:

Even persons who are well educated in the law and have years of experience are largely oblivious to the effects of consolidation upon the procedural rights of litigants. The general belief seems to be that consolidation does not affect litigants' procedural rights. Invariably, when I told friends—law professors, practitioners, magistrate judges—what I was writing about, their response was, "Can you give me an example?"

Steinman, *supra* note 2, at 721 n.11.

not be lost in the shadow of a towering mass litigation."³⁷ There is a price to be paid for the bounty of consolidation that needs to be taken into account.

Recognizing these concerns, the appellate courts have not allowed district judges carte blanche to consolidate, even in mass tort cases. In 1993, for example, the Second Circuit overturned two efforts to consolidate mass tort claims. In one, it reversed a judgment for plaintiffs that resulted from a consolidated trial of 600 asbestos cases.³⁸ The appellate court noted the "herculean task" of coping with mass torts and acknowledged that "[p]re-trial consolidation for the purposes of discovery, the appointment of special masters to expedite the settlement, and, especially, the liberal use of consolidated trials have ameliorated what might otherwise be a sclerotic backlog of cases."³⁹ Nevertheless, the court held that consolidation was an abuse of discretion, reasoning that the varied work histories of the plaintiffs had presented the jury with a "dizzying amount" of evidence and that the case was therefore distinguishable from the 1992 case quoted above, which upheld the judgment of a consolidated trial of asbestos claims for workers at a shipyard.⁴⁰ One judge dissented, arguing that the majority's view "would likely compel the post-trial reversal of most large-scale consolidated trials of product liability claims" even though "[c]onsolidated trials are an indispensable means of resolving the thousands of asbestos claims flooding our state and federal courts, as well as claims arising from other types of mass torts."⁴¹

37. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) (citations omitted).

38. *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 348 (2d Cir. 1993).

39. *Id.* at 350.

40. *Id.* at 349, 353 (citing *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992), quoted in text accompanying note 37 *supra*). In *Malcolm*, the Second Circuit said *Brooklyn Navy Yard* was different due to the similarity of experience of those workers because the employer there was the military, and "uniformity is a way of life with the military." *Malcolm*, 995 F.2d at 353.

41. *Malcolm*, 995 F.2d at 354-55 (Walker, J., dissenting).

The Second Circuit is not oblivious to those concerns. Thus, in *Consorti v. Armstrong World Indus., Inc.*, 64 F.3d 781, 785 (2d Cir. 1995), it emphasized that "[c]onsolidation is a valuable and important tool of judicial administration," and that "without consolidation the courts are simply incapable of handling of such volume" as the 200,000 asbestosis cases filed in state and federal courts. The district judge there had consolidated four separate asbestosis claims for trial, and defendant appealed from the verdict in favor of one plaintiff on the ground that *Malcom* announced a "strong anti-consolidation bias." Citing the ALI Project, *id.* at

In another 1993 case, the Second Circuit granted a writ of mandamus to overturn the consolidation of 44 cases involving repetitive stress injury (RSI) allegedly caused by various types of keyboard office equipment.⁴² The court emphasized that this alleged condition encompasses a wide variety of problems, that these problems may result from individual-specific conditions such as obesity and high blood cholesterol levels, and that the cases involved a wide variety of office equipment (from cash registers to computers).⁴³ Moreover, the Judicial Panel on Multidistrict Litigation had earlier refused to consolidate all RSI cases on the ground that there was not sufficient commonality.⁴⁴ The Second Circuit concluded that "the district court substituted a discussion of so-called mass torts for precise findings as to what are the 'common question[s] of law or fact' justifying consolidation pursuant to Fed.R.Civ.P. 42."⁴⁵

These appellate setbacks for consolidation of mass tort cases emphasize the contemporary importance of consolidation, and also that consolidation can substantially affect the rights and interests of parties. Some of the impetus to submerge the individual features of claims results uniquely from consolidation, while other tendencies in this direction are only compounded by it. In any event, it is important to canvass the sorts of effects consolidation can produce to appreciate consolidation's importance.⁴⁶

786, the court affirmed. It explained the outcome in *Malcom* as due to "factors unique to that case." *Id.* at 785. In particular, it turned out at trial in *Malcom* that the district court was wrong in believing that all plaintiffs had spent most of their work history at power plant work sites, and there were also serious problems caused by the addition on the eve of trial of over 200 companies as third-party defendants. *Id.* at 786-87. Because the district judge in the case before it took pains to distinguish the various consolidated cases for the benefit of the jury, the court concluded that the combination might have improved the quality of the decision in the case. *Id.*

42. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993).

43. *Id.* at 371, 373-74.

44. *In re Repetitive Stress Injury Prod. Liab. Litig.*, 1992 WL 403023 (J.P.M.L. 1992).

45. *Repetitive Stress Injury*, 11 F.3d at 373 (alteration in original).

46. For a similar examination, see William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1546-50 (1995).

A. *Loss of Control*

Consolidation is not supposed to diminish a party's control over its case. Professor Moore's treatise thus continues to assure its readers that after consolidation "each party remains free to control its own case and conduct trial procedures."⁴⁷ But the reality is often otherwise, and even Professor Moore follows his assurance with a citation to a case that undermines that assurance.⁴⁸ A principal impetus behind this loss of control is the need to organize and discipline the numerous parties in a consolidated proceeding. As a New York state court recognized in 1899:

[T]here can be but one master of a litigation on the side of the plaintiffs. It is also plain that it would be as easy to drive a span of horses pulling in diverging directions, as to conduct a litigation by separate, independent action of various plaintiffs, acting without concert, and with possible discord.⁴⁹

To a substantial extent, this loss of control occurs without consolidation when numerous parties are joined in a litigation, and the loss may be felt by both plaintiffs and defendants.⁵⁰

Courts can and do take actions that magnify loss of control, however. The most important is appointment of lead counsel,

47. 5 JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 42.02[5], at 42-36-37 to 42-37 (2d ed. 1995).

48. *Id.* at 42-37, citing *Farber v. Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971) (refusing to consider a motion for summary judgment filed by nonlead counsel).

49. *Manning v. Mercantile Trust Co.*, 57 N.Y.S. 467, 468 (1899).

50. Thus, an experienced antitrust lawyer summarized the situation on the defense side of antitrust class actions as follows:

Even where the court does not formally appoint liaison counsel or lead counsel, everything in an antitrust class action is handled by committee anyway. Those of you who have participated in meetings of counsel in such cases know that your experience in the courtroom does you precious little good; what you would need, ideally, is experience in a state legislature. In fact, it is often the best trial lawyers who have the hardest time adapting to what have become the accepted procedures for handling antitrust class actions. A good trial lawyer's tenacious pursuit of his own theory of the case and his unwillingness to compromise his client's interest in the slightest respect for the good of the majority are almost immediately taken as signs of pigheadedness on the part of his fellow counsel. The result is that he is quickly ostracized from the decision-making inner circle of lawyers on his side of the case, thereby further diminishing his ability to influence the course of the proceedings.

Dando Cellini, *An Overview of Antitrust Class Actions*, 49 ANTITRUST L.J. 1501, 1505 (1980).

which ordinarily involves circumscribing the latitude of other lawyers in the case.⁵¹ Courts have upheld orders that forbid nonlead counsel from filing motions or undertaking discovery without permission from lead counsel.⁵² Beyond appointment of lead counsel, the court may direct that the original pleadings be superseded by a consolidated complaint in order to avoid the confusion that would result from conducting combined litigation with reference to a large number of pleadings. Such consolidated complaints, typically drafted by a committee of lawyers, may have an "everything but the kitchen sink" air that disturbs defendants who find themselves confronting new or expanded charges as a result of the rewriting.⁵³ The consolidation of the complaint can be disturbing to plaintiffs as well, for it takes control over the content of the complaint away from the individual claimants.⁵⁴ Although a court may allow dissenting plaintiffs to abjure certain claims,⁵⁵ plaintiffs may be compelled

51. The MANUAL FOR COMPLEX LITIGATION, THIRD includes a sample order designating lead counsel to determine the position of the plaintiffs on all matters arising in the cases, to coordinate the discovery, to conduct settlement negotiations, and to delegate responsibilities to other lawyers whom lead counsel is to "monitor." MANUAL, THIRD, *supra* note 32, § 41.31. The MANUAL, SECOND, further urged that counsel seek accord, but added that if consensus could not be achieved, "*and if a single position need not be taken by all members of the group, members may proceed on that matter individually or by sub-groups.*" MANUAL, SECOND, *supra* note 32, § 20.222 (emphasis added). The MANUAL, THIRD, softens this provision, saying that if consensus is not achieved "members of the group may have to proceed on the matter individually or by subgroups." MANUAL, THIRD, *supra* note 32, § 20.222.

52. See *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977); see also *supra* note 48.

53. See, e.g., *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1361 (2d Cir. 1975) (noting that defendants who were "actors on the periphery" found themselves potentially facing expanded claims under consolidated complaint); *Waldman v. Electrospace Corp.*, 68 F.R.D. 281, 284 n.4 (S.D.N.Y. 1975) (finding that plaintiffs are more likely to add defendants in consolidated complaint); see also *Diana E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 598 (1991) ("Despite the procedural label, a decision regarding the use of a unified or consolidated complaint may well have implications for other aspects of the case, such as class certification and choice of law questions.").

54. As Judge Murphy noted in her article on consolidated complaints:

Plaintiffs traditionally seek to maintain the maximum degree of control over their cases, and multidistrict cases produce more than the usual amount of tension among counsel regarding case management issues. . . . [A] court order *requiring* the filing of a unified complaint, even one limited to pretrial proceedings, may be viewed by counsel as an intrusion on their right to conduct their case as they see fit.

Murphy, *supra* note 53, at 601-02. See also Steinman, *supra* note 12, at 973-76.

55. See *In re Storage Tech. Corp. Sec. Litig.*, 630 F. Supp. 1072, 1074 (D. Colo. 1986).

to pursue claims they prefer not to assert.⁵⁶ Assurances that the various cases will be unbundled for trial and the original complaints reinstated⁵⁷ seem inherently unreliable since discovery, decisions on motions, and other pretrial orders all focus on the consolidated complaint.

In sum, as others have noted, consolidation can leave claimants with as little control over their cases as unnamed class members in a class action.⁵⁸ Of course, the loss of control may be viewed as a matter of only moderate concern depending on the size and nature of the claims involved. With personal injury claims, however, there is a deep tradition of individual autonomy.⁵⁹ But even in personal injury claims, empirical research suggests that tort claimants often do not have a strong sense of control over the cases when handled in the normal manner,⁶⁰ and opposition to combined treatment may be due more to the reaction of lawyers than to that of parties.⁶¹ Indeed, although it seems undeniable that claimants like personal involvement in their cases, it may be that alternatives to traditional litigation could offer more promise of actual involvement for most claimants.⁶²

56. See *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 262, 264-65 (D. Minn. 1989) (including additional defendants in consolidated complaint over objection of some plaintiffs). But cf. *Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (holding that consolidated complaint including law firm as a defendant is inappropriate because all plaintiffs but one disavowed claim against law firm and that one plaintiff appeared to lack standing to sue firm).

57. In *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975), the district judge said that the use of a consolidated complaint during pretrial "could be without prejudice to unfurling the separate flags at trial." *Id.* at 1358.

58. See, e.g., Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 816-24 (1985); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1042 (1993) ("[A]fter consolidation, the procedural safeguards that due process and codified rules demand in class actions of similar magnitude often do not counterbalance the litigant's loss of control."); cf. Silver, *supra* note 35, at 497-98 (arguing that consolidations are unlike class actions because they are not representational actions, and "[p]arties and lawyers who stand at the head of a consolidation lead not as a dictator leads a people, but as an explorer leads a group of settlers into a new land—by going first").

59. See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 70-76.

60. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89.

61. Cf. Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?* 98 F.R.D. 323, 329-30 (1983) (criticizing plaintiff lawyers' opposition to class certification in mass tort cases as self-interested).

62. See Hensler, *supra* note 60, at 104 ("Faced with the realities of modern mass tort litigation, courts—and legal scholars—should be open to the possibility that expanding the use of formal aggregative procedures may provide more litigant

B. *The Blending Effect*

Combining cases because of their similarities stresses the factors of similarity and can consequently deflect attention from features that distinguish cases from one another.⁶³ One symptom of this blending effect is the tendency in multidistrict proceedings to defer discovery or other action on unique aspects of cases and instead to focus the consolidated proceedings on common issues.⁶⁴ Natural and expedient though this may be, it also bespeaks a shift in emphasis that may prejudice parties on one side or the other, or both.

From the defendants' perspective, the concern is that individualized grounds of defense may be submerged or obscured due to preoccupation with common issues. The marginalization of individual defenses has been a frequent complaint in class actions, and has sometimes caused courts to refuse to allow class treatment.⁶⁵ But other courts have solved such problems and facilitated class treatment by streamlining the application of substantive law to shave away elements that would require consideration of individual circumstances.⁶⁶ Much as there may be good reason for such refinement in the grounds for liability,

control over the litigation process, more opportunity for litigant participation in the process, and a better match between victims' losses and compensation in those cases."); see also E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION AND JUDICIAL SETTLEMENT CONFERENCES* 79-80 (1989) (reporting that litigants surveyed preferred arbitration to court-promoted settlements because they felt more involved in the former).

63. "Courts' attempts to manage mass torts efficiently often further increase the commonality among mass tort claims." Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 967 (1993).

64. See generally DAVID F. HERR, *MULTIDISTRICT LITIGATION* § 9.7.3 at 204-07 (1986) (focusing on common discovery with special provision for individual issues). This orientation lies behind the effort to separate the common issues for initial decision that the Project seeks to promote. See COMPLEX LITIGATION PROPOSAL, *supra* note 3, 112-16.

65. See, e.g., *Windham v. American Brands, Inc.*, 565 F.2d 59, 65-72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (holding that need for individualized proof of impact and damages doomed antitrust class action).

66. See, e.g., *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) (employing fraud on the market theory in a securities fraud class action to obviate individualized proof of reliance). Related but more difficult issues arise when state-law claims are within the supplemental jurisdiction of the court, and the court seeks to blend the provisions of the law of several states, or to focus on the law of a single state, to facilitate aggregated resolution of cases using a class action or other procedural devices. For discussion of these problems, see COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 347-49.

it seems difficult to deny that a prime impetus for the shift has been the judicial desire to handle cases in gross.

From the plaintiffs' perspective, the homogenizing effect of combined litigation is a mixed blessing, depending on the individual circumstances of a given plaintiff. There is already something of a shift toward the mean in individual litigation that leaves claimants with the largest and strongest claims receiving less complete compensation than those with small claims.⁶⁷ Consolidation may accelerate this tendency, benefiting plaintiffs with weak claims, while harming plaintiffs with stronger claims.

C. *Magnifying the Urge to Sever Issues*

Although bifurcation is said to be a "wholly different" procedure from consolidation,⁶⁸ it is not an accident that the two are combined in Rule 42. A court may find it desirable to separate issues for trial in order to expedite or simplify the resolution of a case between two parties. Indeed, a 1987 survey of state and federal judges indicated that they "overwhelmingly" supported bifurcation of issues "in appropriate cases."⁶⁹ But even in a case with only two parties, the task of segregating certain issues for separate trial may prove daunting.⁷⁰ As Judge Posner recently put it, a district judge who orders bifurcation "must carve at the joint."⁷¹ When separate cases are consolidated but still involve unique issues, the urge to consolidate and to extract the common issues for trial, deferring the others

67. See Hensler, *supra* note 60, at 100-03. To a substantial extent this batching may result from the practices of plaintiffs' counsel. At least in asbestos personal injury litigation, some plaintiff lawyers carry large "portfolios" of litigation and some seek what are called "inventory settlements" applying to large numbers of clients. See, e.g., *Georgine v. Amchen Prod., Inc.*, 157 F.R.D. 246, 294 (E.D. Pa. 1994). More generally, in mass tort litigation there have emerged two categories of attorneys known as the "wholesalers" and the "retailers," identified by their preference for either individual litigation or group resolution of claims. See RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 73 (1991) (describing emergence of two groups of plaintiff lawyers representing women claiming injury due to Dalkon Shield).

68. 9 WRIGHT & MILLER, *supra* note 24, § 2381, at 427.

69. LOUIS HARRIS & ASSOC., INC., *JUDGES' OPINIONS ON PROCEDURAL ISSUES* 58-65 (1987) (study No. 87017).

70. *E.g.*, *Symbolic Control, Inc. v. International Business Mach. Corp.*, 643 F.2d 1339 (9th Cir. 1980) (reversing the judgment for the defendant in an antitrust case because the district court, as a result of its bifurcation order, improperly truncated the causation inquiry).

71. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995).

for later action, follows rather naturally. That practice may be troublesome, however, for at least two related reasons.⁷²

The first can be called the sterile trial problem. The paradigm recent example was *In re Bendectin Litigation*,⁷³ in which the Sixth Circuit affirmed a defense verdict despite serious misgivings about the district court's order that the issues be trifurcated for trial. Owing to transfer by the Judicial Panel on Multidistrict Litigation and removal from state court, the district court had before it over 800 cases involving claims of over 1,100 plaintiffs for birth defects allegedly resulting from exposure in utero to defendant's antinausea drug. To expedite the handling of these cases, the district court eventually trifurcated the issues, leading to an initial trial on the question of whether the drug is a proximate cause of birth defects.⁷⁴ In addition, the district judge directed that all visibly deformed plaintiffs be excluded from the courtroom during the trial. The appellate court recognized that the judge's order "could possibly prevent the plaintiffs from exercising their right to present to the jury the full atmosphere of their cause of action, including the reality of injury,"⁷⁵ and that the severance created the risk that the trial would have "a sterile or laboratory atmosphere."⁷⁶ Although it found this the "most troubling" aspect of the case, the appellate court affirmed because Rule 42 gives the district court "virtually unlimited freedom to try the issues in whatever way trial convenience requires."⁷⁷ Moreover, it noted that individual trial of all these cases could have occupied 182 district judges for a year.⁷⁸ A concurring judge criticized the district judge's handling of the case, noting that "the typical procedure in litigation does not involve the splitting up of a case, element by element, and trying each point to the jury separately,"⁷⁹ but he found no prejudice in this case because

72. For a more detailed examination of the arguments related to issue separation, see James A. Henderson et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1675-94 (1995).

73. 857 F.2d 290 (6th Cir. 1988).

74. The plaintiffs had consented to be bound by Ohio law, thus eliminating the possibility that different legal rules would preclude presentation of a single, common issue.

75. *In re Bendectin Litig.*, 857 F.2d at 315.

76. *Id.* (quoting *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 217 (6th Cir. 1982)).

77. *Id.* at 316 (quoting 9 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2387, at 278 (1st ed. 1971)).

78. *Id.*

79. *Id.* at 328 (Jones, J., concurring in part and dissenting in part). Judge

plaintiffs had presented no evidence of any link between the drug and birth defects.⁸⁰ The Anglo-American tradition has relied on a complete in-court trial in which the litigant may participate. As in *Bendectin*, consolidation and bifurcation may undermine that tradition. Separation of issues may also truncate the ability of a jury to assess the case.⁸¹ Thus, the sterile trial risk raises basic concerns.

The urge to extract common issues also leads to a second concern—a pro-defendant shift in results. Thirty years ago it was reported that defendants in personal injury cases won forty-two percent of those cases in which liability and damages were tried together, but seventy-nine percent of those in which liability was tried separately.⁸² This difference might indicate

Jones explained his concerns with the district judge's order regarding the manner of trial as follows:

Although each distinct event involved the ingesting of the same drug, it is hard to believe that *all* eight hundred plus claims can be tied neatly into one package and satisfactorily resolved by the answering of one question, *i.e.*, did Bendectin cause the relevant birth defects? In tying all of these claims together, an argument could certainly be made as to prejudice. That is, by not allowing the plaintiffs to present evidence as to how they were *individually* affected by the drug, [the court's order] *could* have resulted in prejudice to them in their attempt to establish the required elements of their case.

Id. at 327.

80. *Id.* On the factual basis for the claims, see Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301, 347 (1992) ("The scientific community seems to have reached something close to a consensus concerning the drug. While no study can remove all residual uncertainty regarding Bendectin's safety, if the drug is a teratogen, it is a relatively mild one").

81. See Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989).

[U]nitary trial juries do tend to . . . utilize all the trial evidence while deciding each individual trial issue. Indeed, the initial analysis of the deliberations indicate[s] that unitary trial juries often do not decide liability or causation until they hear evidence concerning damages.

Juries in separated trials appear to employ other, perhaps less sophisticated, heuristics to decide the issues. These latter juries tend to use more extreme heuristics: corporate-capitalist versus the little guy; good guy versus bad guy rhetoric dominates these deliberations. The bifurcation of general causation in the separated trial condition produces greater disbelief about causation yielding fewer verdicts for the plaintiffs. It may be that only more extreme pro-plaintiff juries who appeal to the good guy-bad guy [sic] rhetoric remain in the separated trial condition to vote for the plaintiffs.

Id. at 27.

82. Maurice Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in HARRY W. JONES, *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 48

that courts sever more often when the case for liability appears weak, but "when it is seen that the split trial reduces by more than half the cases in which personal injury plaintiffs are successful, it is apparent that bifurcation makes a substantial change in the nature of the jury trial itself."⁸³

D. Judicial Burden

Finally, the assumption that consolidation invariably reduces the burden on judges, though popular, seems open to question. Some proponents of broad consolidation seem to act as if the law of diminishing returns has been repealed. But the combination of cases may create an ungainly single litigation in place of a series of commonplace cases.⁸⁴ Discovery incentives on both sides may be substantially altered by consolidation, as may the incentives to dispute other matters. A joint trial may be dispositive only if favorable to defendants, and otherwise lead to individualized further proceedings in which the results of the joint trial must be given effect. Thus, even the most forceful justification for consolidation—judicial economy—may, upon examination, prove to be an ambivalent one.

E. The Need for Clearer Guidelines

Over 60 years ago, Professor Chafee intoned that "[i]n matters of justice, . . . the benefactor is he who makes one lawsuit grow where two grew before."⁸⁵ More recently, however, we have seen reasons for skepticism about consolidation of cases. The foregoing litany of concerns overstates the negative potential of consolidation, but does point up serious grounds for anxiety about when and how consolidation is ordered. Although some conclude that Rule 42 provides adequate guidance on those questions,⁸⁶ the reality is that the sole direction in the

(1965).

83. 9 WRIGHT & MILLER, *supra* note 24, § 2390, at 508.

84. Other procedural devices may produce similar overload problems. See Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 710-20 (1978) (exploring ways in which increased intervention may lower the quality of judicial action by overloading the courts).

85. Zechariah Chafee, Jr., *Bills of Peace With Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932).

86. Harris, *supra* note 14, at 1292 ("The criteria for granting consolidation set forth in rule 42(a) have been the subject of little controversy."); Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S.*

Rule is that the trial judge has broad discretion. That orientation was certainly the view when Rule 42 was originally adopted,⁸⁷ but given the increased importance of consolidation and the attendant concerns sketched above, that orientation bears reexamination. Confronted with such concerns as those addressed above,⁸⁸ the Federal Courts Study Committee recommended in 1990 that either the Federal Rules of Civil Procedure or the Manual for Complex Litigation should include guidelines for consolidation and severance.⁸⁹ Neither the newly minted Manual for Complex Litigation, Third, nor the Federal Rules incorporates such specifics,⁹⁰ but the ALI Project may be a substitute source for such guidance.⁹¹

IV. THE ALI PROJECT'S GUIDANCE ON CONSOLIDATION

Rule 42 in *Alice in Wonderland* had the advantage of providing a precise standard for its application—persons more than a mile high were banned from the court. Although there might be debates on whether the rule applied to a given person—witness Alice's protest that she is not a mile high—it did afford a relatively precise linear measure. The emphasis on discretion lying behind Rule 42 of the Federal Rules of Civil

Courts of Appeals Disagree on Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal, 141 F.R.D. 169, 169 (1991) ("[T]he law in this area is now largely settled.").

87. See, e.g., 18 FRANCIS A. DARNIEDER, HUGHES FEDERAL PRACTICE 255 (1940) ("It is evident that the court must be given extensive discretionary powers in order to expedite a determination of the issues and avoid delay and inconvenience."); ALEXANDER HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 116 (1940) ("In the interest of expediting and simplifying trials, the court is given broad authority, on the one hand, to consolidate cases for trial and, on the other hand, to order separation of different issues in the same case."); W.S. SIMKINS, FEDERAL PRACTICE 70 (Alfred Schweppe ed. 1934) (Consolidation "is entirely within the discretionary power of the court.").

88. See *Memorandum from Richard L. Marcus to Workload Subcommittee, Federal Courts Study Committee re guidelines for consolidation and severance procedures* (Oct. 16, 1989) in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter *Marcus Memorandum*]. This memorandum raises several of the concerns mentioned in the text.

89. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 45 (April 2, 1990).

90. The MANUAL, THIRD, *supra* note 32, § 21.631, provides some general guidelines regarding consolidation, but it does not come close to the Project in its attention to the subject.

91. It should be noted that the then-current draft of the COMPLEX LITIGATION PROPOSAL was brought to the attention of the Federal Courts Study Committee in connection with its recommendation. See *Marcus Memorandum, supra* note 88, at 10-12.

Procedure precludes similar precision, perhaps for good reason.⁹² The Multidistrict Litigation Act similarly lacks hard guidance.⁹³ But given the centrality of consolidation to the ALI Project, a more focused or confining regime seems in order.

To put this point in context, it is worthwhile to catalogue the array of striking innovations the Project proposes in order to facilitate consolidation. It recommends substituting a Complex Litigation Panel for the current Judicial Panel on Multidistrict Litigation and vesting that body with authority to transfer cases pending in federal court for trial as well as for pretrial purposes.⁹⁴ This sort of revision has already been proposed in Congress.⁹⁵ The Project goes beyond, however, and proposes authorizing the Panel to order the removal for consolidated treatment of otherwise nonremovable cases pending in state court.⁹⁶ It also prescribes controversial approaches to choice of law questions to remove the obstacles to consolidation that could result from having different substantive law apply to different cases.⁹⁷ To avoid disruption of the consolidated litigation in the target court, the Project would additionally authorize the transferee court to enjoin "transactionally related proceedings" in state and federal courts⁹⁸ and to enter an order that invites nonparties to intervene and binds them by its determinations whether or not they accept the invitation.⁹⁹ Moving further beyond current law, the Project would authorize the Panel to direct transfer of cases filed in federal court to a state transferee court under certain circumstances,¹⁰⁰ and it

92. Comment, *supra* note 29, at 381, states:

It is neither possible nor desirable for courts to treat motions under 42(a) with the cold logic Alice displayed in dealing with Rule Forty-Two in Wonderland. What is required is a constant sensitivity to the equities of individual cases in conjunction with the experience courts have gained in handling juries and in administering the cases on their dockets.

Id.

93. See HERR, *supra* note 64, § 5.1, at 71 (stating § 1407 criteria are merely thresholds, and the statute "is of limited value in determining whether transfer is appropriate in a particular case").

94. COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 3.02, at 62-70.

95. See, e.g., H.R. 3406, 101st Cong., 1st Sess. (1991).

96. COMPLEX LITIGATION PROPOSAL, *supra* note 3, §§ 5.01-5.03, at 220-62.

97. *Id.* §§ 6.01-6.08, at 321-436. These sections have drawn the most fire from academic commentators. See, e.g., Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992).

98. COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 5.04 at 263-75.

99. *Id.* § 5.05, at 275-303.

100. *Id.* § 4.01, at 177-201.

recommends the adoption of an Interstate Complex Litigation Compact to effect concentration of cases in courts of different states.¹⁰¹

This is heady stuff. The proposed authority to shift cases properly filed in federal court to a state court, for example, "would create a system that differs in material respects from anything in our two centuries of constitutional and procedural history."¹⁰² Although the proposed interstate compact has a distant and thus-far unutilized actual analogy,¹⁰³ it would also break new ground. Whether or not the Project's proposals would, if adopted, cause "a complete revolution in the way in which mass tort cases are decided today,"¹⁰⁴ it is clear that the goal of the Project goes well beyond time-saving and facilitation of litigation. Building on past experience with consolidation, the Project seeks very significantly to enhance the power to consolidate by removing longstanding obstacles that presently prevent or impede consolidation.

It is certainly possible to assess the Project's proposals without focusing on whether increased consolidation itself is a good thing.¹⁰⁵ The Project itself was based on a preliminary study that embraced an "intuition" that consolidation would provide important advantages.¹⁰⁶ But as we have already seen, there can be real costs to consolidation.¹⁰⁷ Before embracing these dramatic changes one would logically move beyond intuition and scrutinize the means adopted to avoid or minimize these costs. The Project basically seeks to channel the power to

101. *Id.* § 4.02, at 201-16, app. B.

102. Steinman, *supra* note 58, at 1038-39 (footnote omitted).

103. In 1991, the Commissioners on Uniform State Laws endorsed a Uniform Transfer of Litigation Act, but it has yet to be used. For discussion of that proposal, see Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project With the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

104. Richard Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation*, 10 J.L. & COM. 1, 61-62 (1990).

105. "Jurisdictional and transfer proposals to facilitate consolidation, then, can proceed from a relatively agnostic position about how worthy consolidated treatment is in various situations" Thomas D. Rowe, Jr., *Jurisdiction and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325, 326-27 (1991).

106. Before it embarked on the actual Project, the ALI did a study of complex litigation that explained in its introduction that "[t]his Preliminary Study is inspired by the intuition that the common transaction, series of transactions, or course of conduct from which these complex cases arise should provide a basis for some form of consolidated or coordinated treatment of all of the resulting litigation." AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 5 (1987).

107. See *supra* text accompanying notes 47-84.

consolidate in two ways: by articulating a standard for consolidation and by delegating prime responsibility for the decision whether to consolidate to the Panel that it seeks to create. In addition, the Project provides some guidance on severance. We turn to these proposals now.

A. *The Standard for Consolidation*

Until now, consolidation has operated without any carefully articulated statutory or rule-based standards, relying instead on ad hoc judgments by individual judges or by the Judicial Panel on Multidistrict Litigation. But ever since discussion of expanding consolidation began a decade ago, proponents of reform have recognized that they do not want to create "a legal vacuum cleaner to suck all parties into a single federal court regardless of the consequences."¹⁰⁸

The problem lies in providing sensible constraints. Buried in Appendix B of the ALI Project, which contains a Reporters' Study outlining a proposed interstate compact for consolidation of cases pending in the courts of various states, is an elegant comment that captures the difficulty confronting one who would fashion such constraints:

Statisticians and epidemiologists describe and evaluate a test with reference to its "sensitivity" and "specificity." The probability that a positive test result will indicate the presence of the characteristic being tested for is its sensitivity. Conversely, the probability that a negative test will indicate the absence of the characteristic being tested for is the test's specificity. The sensitivity and specificity of a test are a function of the threshold for a positive test result. When that threshold is raised, there will be an increase in specificity and a decrease in sensitivity. Thus, by increasing the threshold for eligibility for consolidation, it is more likely that the cases that are selected for consolidation will be best suited for unitary treatment (an increase in specificity). At the same time, some cases that may have benefitted from unitary treatment will not be eligible for consolidation (a decrease in sensitivity).¹⁰⁹

108. Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 17 (1986).

109. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 467.

The problem confronting the framers of the Project was to find the best balance between sensitivity and specificity.

One approach might be to adopt precise standards like Rule 42 in Wonderland. Other proposals to expand consolidation have relied on precise limits on the number of claimants or the dollar amount involved to provide a definite prerequisite for consolidation.¹¹⁰ On the floor of the American Law Institute as the Project came up for its final vote, Judge Jack Weinstein proposed that its provisions be conditioned on a similar prerequisite of 5,000 claimants with claims aggregating at least \$100 million, but this proposal was defeated.¹¹¹ The omission of such a numerical prerequisite for consolidation is warranted. A predicate as high as the one proposed by Judge Weinstein could only rarely be satisfied, leaving the entire work product of the Project to sit on the shelf in all but the most extraordinary cases, and even then to come into play only after a great deal of other litigation activity. Even with class actions, which do have a numerosity prerequisite,¹¹² the actual number necessary for class certification is uncertain and vastly below the number proposed by Judge Weinstein.¹¹³ To adopt a numerical prerequisite closer to the current multidistrict experience¹¹⁴ would mean that the numerical requirement would be so easily satisfied

110. Thus, Professor Rowe and Mr. Sibley suggested that expanded federal jurisdiction for complex cases could be limited to cases involving at least 25 victims. See Rowe & Sibley, *supra* note 108, at 33, and Congress has considered statutes incorporating similar numerical limitations; see H.R. 3406, 101st Cong., 2d Sess. § 2(a) (requiring that at least 25 natural persons be injured, each with damages in excess of \$50,000).

111. See *ALI Finishes Complex Litigation Project, Makes Progress on Various Restatements*, 61 U.S.L.W. 2709, 2710 (1993).

112. See FED. R. CIV. P. 23(a)(1) (allowing class actions only if class members are too numerous to be joined).

113. See 7A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE*, § 1762 (1986) (citing cases allowing class status with classes of 25, 35, 40 and 50 members, but also citing cases that deny class certification on numerosity grounds for classes as large as 350).

114. The ALI Project reports that the Judicial Panel on Multidistrict Litigation has almost always found the benefits of transfer were satisfied if there are more than five actions involved. *COMPLEX LITIGATION PROPOSAL*, *supra* note 3, at 52; see also Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1009-10 (1974) (noting transfer is "almost certain . . . if more than five actions are involved").

that it would place no significant restraint on consolidation.¹¹⁵ Effective limitations must be sought elsewhere.

The ALI Project goes well beyond any other codified set of consolidation guidelines in attempting to provide such limitations. Although this Article criticizes the vigor with which the Project constrains consolidation in its central provisions, it should acknowledge that the Project's basic scheme appears wise and that the debate is about matters of implementation. The starting point is to recognize, as noted above,¹¹⁶ that consolidation and class action treatment "have increasingly been regarded as alternative, indeed possibly fungible, mechanisms for accomplishing aggregation."¹¹⁷ The Project thus borrows overtly from Rule 23, the class action rule,¹¹⁸ but it also invokes the same transaction standard that is articulated in Rule 20 for permissive joinder of parties.

The Project's varied standards apply to different circumstances in which the Project proposes to authorize consolidation. The general standard for cases pending in federal court is embodied in section 3.01, which is a watered down version of Rule 23(b)(3). In contrast, the standard found in Reporters' Study in Appendix B, for consolidation pursuant to the novel proposed interstate compact, is a relatively direct adoption of the Rule 23(b)(3) standard for class certification. In between, section 5.01 articulates the standard for removal and adds a "same transaction" test to the common question standard that is embodied in section 3.01.¹¹⁹ These differences are justified on

115. The Project explains in commentary that "exact dimensional criteria" were rejected in part because even when there are very few parties or cases, consolidation may be warranted due to complexity of the issues or volume of discovery, or to "avoid significant duplication of effort [for a] defendant." COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 52-53.

116. See *supra* text accompanying notes 32-38.

117. Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 256 (1991).

118. *E.g.*, COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 49 ("A similar test is applied under Fed. R. Civ. P. 23(b)(3) . . ."); *id.* at 117 ("The procedure for the severance of issues under Rule 23(c)(4) is similar to that under Rule 42(b)."); *id.* at 461 ("This standard is analogous to the criteria applied for class certification under Federal Rule 23(b)(3) . . .").

119. This description for the various consolidation criteria may prove confusing to some readers, so it seems wise to provide a schematic summary of the criteria employed in each of the three formats provided in the Project. As used below, "minimum commonality" means that the consolidation provision only requires that there be some common question. Similarly, "minimum superiority" means that the consolidation provision only requires that consolidation "promote the just, efficient,

the ground that jurisdiction and other factors extrinsic to the pure consolidation decision mandate different treatment.¹²⁰ Without focusing on the justifications offered for different treatment, this Article questions the departures from the Rule 23(b)(3) model on the grounds (1) that the class action standard is sufficiently flexible for consolidation, and (2) that lowering the threshold below that standard would be unwise.

Rule 23(b)(3) directs the court to certify a class only if it finds that common questions predominate and that a class action would be superior to other modes of adjudication. Certainly the same basic approach could be utilized to bring consolidation into parallel treatment with class actions. As the Reporters of the Project recognized in emulating Rule 23(b)(3) in Appendix B, however, the class certification standard "is more demanding than that set forth in 28 U.S.C. § 1407 and proposed [in section 3.01 of the Project] for the consolidation and transfer of lawsuits within the federal system."¹²¹ Section 3.01 requires only that there be one common question of fact and that transfer "promote the just, efficient and fair conduct of the actions."¹²² Yet the commentary to section 3.01 begins with the following explanation:

The underlying premise of the consolidation standard set forth in this section is that a series of related claims will not be transferred for consolidated treatment unless the parties

and fair conduct of the actions," rather than directing that consolidation be ordered only if it would be superior to individual litigation in terms of those criteria.

	<i>Commonality</i>	<i>Superiority</i>	<i>Same Transaction</i>
§ 3.01	minimum	minimum	not required
§ 5.01	minimum	minimum	required
App. B	predominance required	superiority required	not required

120. Thus, § 5.01's addition of the same transaction requirement is justified on the ground that "this section acts as a jurisdiction, as well as a consolidation, mechanism." COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 225. Similarly, the more stringent requirements of Appendix B are justified on the ground that combining cases from different state courts is more intrusive.

121. *Id.* at 461.

122. *Id.* at 37.

and the judicial system will realize a significant savings in time and resources . . . and those savings can be achieved in a manner that is fair to the litigants.¹²³

In terms of both sensitivity and selectivity, the adoption of a full-fledged Rule 23(b)(3) standard for consolidation by the Reporters in Appendix B better serves these goals than the watered-down version in section 3.01.

1. *Predominance of common questions*

The Reporters label Rule 23(b)(3)'s requirement that common questions predominate a "super-commonality" criterion that is "more demanding" than the requirement of section 3.01 that there be a common question of fact.¹²⁴ But the Reporters also recognize that predominance is "fairly specific and objective,"¹²⁵ and make forceful arguments in commentary to Appendix B that underscore the usefulness of the predominance requirement in achieving the goals they set for section 3.01.¹²⁶ Looking beyond the Project, it is useful to recall what the Reporters say in their treatise on federal practice about the Rule 23(b)(3) predominance requirement:

[T]he predominance test really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis.¹²⁷

123. *Id.* at 38-39.

124. *Id.* at 463.

125. *Id.* at 462.

126. In explaining their use of the predominance standard in Appendix B, the Reporters state:

[A] high threshold ensures a substantial overlap of claims or issues so that the costs to the system and the parties of consolidation and management will not outweigh the costs of allowing the cases to remain dispersed. . . . [T]he requirement that common questions predominate serves as a fairness safeguard, ensuring that claims or issues bearing no relation to each other will not be gathered together. Treating dissimilar cases alike would be as unfair as treating similar cases differently.

Id. at 463-64.

127. 7A WRIGHT ET AL., *supra* note 113, § 1777, at 518-19. Two of the authors of this treatise, Arthur R. Miller and Mary Kay Kane, were, respectively, Reporter and Associate Reporter of the COMPLEX LITIGATION PROPOSAL.

This sounds almost exactly like the goal the Reporters set for section 3.01.¹²⁸ Moreover, there is some language in the commentary to section 3.01 itself that suggests that even under the proposed formulation of section 3.01, predominance should be important.¹²⁹ Indeed, the recently released Manual for Complex Litigation, Third, cautions that "[u]nless common evidence predominates, consolidated trials may lead to jury confusion while failing to improve efficiency."¹³⁰

The sticking point, it seems, is the one the Reporters make in Appendix B—that the predominance standard is fairly specific and objective.¹³¹ Much as that might seem a selling point to one concerned about controlling use of consolidation, the commentary to section 3.01 emphasizes that for cases in federal court section 3.01 allows "maximum discretion" to consolidate and thereby makes the commonality standard "so minimal" that it "rarely will be dispositive."¹³² The Reporters reason that a predominance requirement would create a risk that the standard would err on the side of specificity and unduly diminish sensitivity, precluding consolidation in some cases where it should be employed.¹³³ But experience under Rule 23 suggests that its predominance requirement has not hamstrung courts; there the courts have treated the predominance standard as satisfied if the common questions "represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication."¹³⁴ They have not automatically interpreted "predominance" to mean "determinative" or even "significant."¹³⁵ Even the Multidistrict Litigation Panel, op-

128. See *supra* text accompanying note 123.

129. "For example, the predominance of individual issues may suggest that consolidation will not promote justice or efficiency." COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 45. Note that this commentary is directed toward the second criterion of § 3.01, discussed *infra* in text accompanying notes 141-52.

130. MANUAL, THIRD, *supra* note 32, § 21.631.

131. See *supra* text accompanying note 121.

132. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 43.

133. The commentary explains:

A more restrictive standard, such as "predominance of common questions," is less desirable because situations might arise in which substantial benefits could be gained by transfer for consolidation even when only a single common factual question is present because it would avoid the duplication of effort that otherwise would result in resolving that issue in separate suits.

Id.

134. 7A WRIGHT ET AL., *supra* note 113, § 1778, at 528.

135. *Id.* at 528-29.

erating under a statute with a minimal commonality requirement, has sometimes used predominance as a criterion for transfer,¹³⁶ and predominance has also been invoked in Rule 42 consolidation decisions.¹³⁷

Other cases handled by the Multidistrict Litigation Panel provide grounds for uneasiness about a minimalist approach to commonality. That Panel rarely makes the common question requirement determinative,¹³⁸ but "simply identifies the common questions that exist and orders transfer without analyzing their relation to the overall litigation to any great degree."¹³⁹ At least in some cases, the commonality found sufficient seems

136. See, e.g., *In re Eli Lilly & Co. Oraflex Prod. Liab. Litig.*, 578 F. Supp. 422, 423 (J.P.M.L. 1984) ("Although we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will, in the future course of this litigation, predominate over individual questions of fact . . ."); *In re Sears, Roebuck & Co. Employment Practices Litig.*, 487 F. Supp. 1362, 1364 (J.P.M.L. 1980) ("Individual rather than common factual questions predominate regarding the liability aspects of the five actions before us," and the common factual questions do not "overcome the overall predominance of individual factual questions . . ."); *In re Airline "Age of Employee" Employment Practices Litig.*, 483 F. Supp. 814, 814 (J.P.M.L. 1980) (denying transfer after district court rejected motion to consolidate under Rule 42 because common questions do not predominate); *In re Westinghouse Elec. Corp. Employment Discrim. Litig.*, 438 F. Supp. 937, 939 (J.P.M.L. 1977) ("[I]ndividual rather than common factual questions predominate in this litigation."); *In re Asbestos and Asbestos Insulation Material Prod. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("Many factual questions unique to each action or to a group of actions already pending in a single district clearly predominate, and therefore transfer is unwarranted."); *In re King Resources Co. Sec. Litig.*, 342 F. Supp. 1179, 1183 (J.P.M.L. 1972) (noting that parties have argued convincingly that common issues do not predominate); see also *In re "The Exorcist" Copyright Infringement Litig.*, 411 F. Supp. 793, 793-94 (J.P.M.L. 1976) (rejecting argument that common questions do not predominate).

137. See *Close v. American Honda Motor Co., Inc.*, 1994 WL 761957, at *3 (D.N.H. 1994) ("On the basis of the record before it, the court finds that the plaintiffs have not met their burden of showing that a Rule 42(a) consolidation is appropriate here. . . . [B]ecause individual issues in the civil actions predominate over common issues, separate depositions, interrogatories, and requests for documents will be more beneficial to plaintiffs than consolidated discovery."); *Scardino v. Amalgamated Bank*, 1994 WL 408180, at *2 (E.D. Pa. 1994) ("Although there are common questions of law or fact in both actions as to the validity of the note and mortgage, these questions are not sufficiently predominant in this action to warrant consolidation."); *Maruzen Int'l Co., Ltd. v. Bridgeport Merchandise, Inc.*, 1991 WL 130170, at *1 (S.D.N.Y. 1991) (ordering consolidation because common questions predominate); *Henderson v. National R.R. Passenger Corp.* 118 F.R.D. 440, 441 (N.D. Ill. 1987) ("Although certain common issues of fact may exist in both actions, the variety of individual issues predominate.").

138. But see cases cited *supra* note 136.

139. 15 WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE*, § 3863, at 515 (2d ed. 1986).

almost nonexistent. For example, in *In re Aviation Products Liability Litigation*¹⁴⁰ the Panel was presented with a series of cases pending in districts in seven states and involving malfunctioning helicopter engines. The helicopters in question were made by two different manufacturers, and the claims were quite disparate. A number of the cases presented claims by corporate helicopter owners for damages to the helicopters and their businesses due to malfunctioning of the engines. Other cases involved personal injury claims by people injured in helicopter crashes. Still other cases involved claims that the helicopter frames had been improperly designed and that certain helicopters had not been properly maintained. The only link among the cases was that each helicopter had the same make of engine, although different components of that engine were cited as responsible for different incidents. Despite vigorous opposition from many parties, the Panel ordered transfer, reasoning that "although the specific defects alleged in each separate case may not be identical they are all interwoven so as to cover the engine's general condition and airworthiness."¹⁴¹

It may be that the Panel's action in *Aviation Products* was appropriate since the consolidation there was purely pretrial. But if the ALI Project's goal in requiring only minimal commonality is to facilitate consolidation in cases like *Aviation Products*,¹⁴² the predominance requirement seems an important

140. 347 F. Supp. 1401 (J.P.M.L. 1972).

141. *Id.* at 1402.

142. This case was not unique in the annals of the Panel. In *In re Multi-piece Rim Products Liability Litigation*, 464 F. Supp. 969 (J.P.M.L. 1979), the Panel transferred 19 actions brought in 14 different districts to recover for injuries related to the failure of multipiece truck wheels. These products were manufactured by four different companies, at least one of which was sued in each case, and 21 other defendants were named in the actions, but 19 of these were named in only one case. *Id.* at 971. Opponents to the transfer, including plaintiffs in five of the actions and all defendants but one, emphasized that each case involved unique facts. The Panel nevertheless ordered transfer based on the parties' theory that all of the products were "essentially the same, for purposes of this litigation, because they all operate on the same engineering principle." *Id.* at 974.

Similarly, in *In re Multidistrict Commodity Credit Corp. Litig. Involving Grain Shipments*, 300 F. Supp. 1402 (J.P.M.L. 1969), 32 separate claims were made against a variety of railroad companies for alleged losses of grain during shipment. Different kinds of grain were involved in different shipments, but all were in covered hopper cars. Although each claim would turn on the individual circumstances involved in that shipment, the Panel found common questions regarding "general standards for loading and unloading hopper cars, general standards for weighing hopper cars, the integrity of the hopper cars by design and manufacture and the amount of shrinkage or loss of moisture which normally occurs in these grains." *Id.*

limitation.¹⁴³ In essence, the Project's rejoinder appears to be that the primary protection against improper consolidation in section 3.01 is provided by the other element of its test, which directs that consolidation be ordered only where it "will promote the just, efficient, and fair conduct of the actions."¹⁴⁴ But that prong of section 3.01 also omits an important directive that the Reporters included in Appendix B—that consolidation of the cases be "superior to their separate adjudication."¹⁴⁵

2. *Superiority*

The superiority requirement also comes from Rule 23(b)(3) and also appears well-crafted to ensure that consolidation is used only when it is appropriate. Here again, the difference between section 3.01 and Appendix B appears to be designed to emphasize the Project's resolve that a more demanding standard be met before consolidation is effected only in situations governed by Appendix B.¹⁴⁶ This has resulted in an unnecessary watering down of the standard for consolidation within the federal system. Rule 23(b)(3)'s superiority requirement does not impose undue burdens. Instead, the requirement only directs the court to verify that a class action would be "sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court."¹⁴⁷ The commentary on section 3.01 suggests that section 3.01 is designed to ensure that courts follow the same analysis before approving consolidation,¹⁴⁸ and it may be essential to upgrade the black letter of section 3.01 to avoid making the consolidation standard spineless.

As Professor Brunet has cogently noted, there is a pervasive tendency for efficiency to trump competing policies in aggregation decisions,¹⁴⁹ and a spineless consolidation standard

at 1404.

143. Cf. Note, *supra* note 114, at 1016 (characterizing *Aviation Products* as a questionable use of the Panel's transfer power).

144. COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 3.01(a)(2), at 37.

145. *Id.*, app. B, § 1(a)(2).

146. Thus the Reporters are able to note in Appendix B that "[t]he inclusion of a superiority requirement is more demanding than the standard proposed for federal intrasystem consolidation. Compare § 3.01(a)(2)." *Id.* at 464.

147. 7A WRIGHT ET AL., *supra* note 113, § 1779, at 552.

148. See *supra* text accompanying note 123.

149. See Edward Brunet, *The Triumph of Efficiency and Discretion Over Com-*

enables judges to succumb to that tendency. The experience of the current Multidistrict Litigation Panel provides substantial evidence to support this concern and should give Congress pause when it evaluates section 3.01. As originally proposed to Congress by the judiciary, the multidistrict transfer statute did not even call for attention to party interests in the decision whether to transfer, but Congress inserted party interests as a criterion under the Act.¹⁵⁰ Nevertheless, it seems to be generally recognized that party interests have not been given significant weight by the current Panel,¹⁵¹ and one commentator has accused the Panel of "failure to heed this congressional admonishment."¹⁵²

Whatever the propriety of disregarding party interests when transfer is ostensibly for pretrial purposes only, the practice seems contrary to what the Project says it is doing in creating authority for the new Complex Litigation Panel to consolidate for trial. The factors that govern transfer under section 3.01 clearly include party interests,¹⁵³ and the Project's commentary takes account of such interests as well.¹⁵⁴ In order

peting Complex Litigation Policies, 10 REV. LITIG. 273 (1991).

150. See 28 U.S.C. § 1407(a) (1988) (allowing transfer if it "will be for the convenience of parties and witnesses").

151. Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33, 43 (1979) ("[T]he Panel has largely eliminated this guideline as a determinative standard."); Note, *supra* note 114, at 1001, 1003 (1974) ("Once a threshold level of potential savings [of time and effort for judges] is found, however, transfer is almost inevitable.");

152. Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 720 (1991).

153. Section 3.01(b)(2) says one factor "to be considered" is whether "consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses." COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 3.01(b)(2), at 38.

154. *E.g.*, COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 44. According to that commentary:

The just and fair resolution of the actions requires a recognition that intrusion on party autonomy and control can be justified only when there is some reason to treat the underlying cases in a coordinated fashion Consolidation may be ordered only if it will serve fairness and efficiency goals better than allowing the cases to remain dispersed. A party's desire to exercise individual control over the prosecution or defense of a lawsuit, for instance, is a long recognized, but intangible, interest.

Id. at 51.

Because the proposed standard promotes consolidation for trial as well as pretrial, the convenience of the parties and the witnesses must be accord-

to put teeth into the commitment to party interests, a superiority requirement is preferable. Whether a superiority requirement would be sufficient remains debatable. Although the Project does recognize party interests, it also emphasizes in the commentary to section 3.01 that "the decision whether to transfer and consolidate remains discretionary,"¹⁵⁵ using language virtually identical to the commentary to Appendix B,¹⁵⁶ which does require a finding of superiority. Ultimately some discretion seems inevitable for, as Professor Brunet has noted, both fairness and efficiency are multifaceted concepts.¹⁵⁷ But if Appendix B really is to be as elastic as section 3.01, there is reason to suspect that it is not sufficiently strict.

One step toward confining the latitude is, as mentioned above, to require predominance of common questions as a prerequisite to consolidation. Additionally insisting on a finding of superiority, and treating that as a serious requisite, appears a further positive step. In essence the superiority reasoning calls for the court to examine the pros and cons of consolidating the cases or leaving them to proceed separately. Although by no means a straightjacket, the balancing can be considerably more than a meaningless exercise. Consolidation need not be denied merely because the consolidated action would be ungainly or hard to manage, but consolidation must be justified by findings based on an actual comparison between consolidated and individual handling of the litigation. Such a comparison gives effect to the Project's objective that consolidation only occur when it actually is preferable to individual litigation. More precise requirements on the superiority prong are probably undesirable. The Project itself examines a variety of considerations, and there will be instances in which some of these favor consolidation while others do not. In such circumstances, it will be up

ed more careful consideration than would be the case if transfer and consolidation were limited to the pretrial proceedings.

Id. at 51.

155. *Id.* at 52.

156. *See id.* at 469.

157. Brunet, *supra* note 149, at 275-76 (footnote omitted). A tension between efficiency and fairness clearly exists, but the precise nature of that tension defies a simple, satisfactory definition because both terms incorporate many concepts. Efficiency is a vague idea having numerous meanings both generally and as applied to complex litigation. Similarly, the meaning of fairness may range from an autonomous right to a single trial without cooperating with any co-parties to a seemingly contradictory right to intervene in a complex case initiated by another in order to protect one's interests. *Id.*

to the Panel to balance the various factors and decide whether to consolidate.

3. *Same transaction*

The Project's consolidation standard offers yet another wrinkle in section 5.01, which proposes a new removal jurisdiction that would allow the Panel to combine cases pending in state court with cases pending in federal court. Besides invoking the standard of section 3.01 and requiring "consideration of whether removal will unduly disrupt or impinge upon state court or regulatory proceedings," section 5.01 removal is available only if the state cases "arise from the same transaction, occurrence, or series of transactions or occurrences" as the cases pending in federal court.¹⁵⁸ It appears that the same transaction provision, which is similar to that in Federal Rule 20(a), was added because there is a jurisdictional aspect to section 5.01.¹⁵⁹ But the operation of the Rule 20 provision tends to devolve into a variant of the commonality principle.¹⁶⁰ Although consolidation based on common question is said to be broader than joinder under Rule 20,¹⁶¹ and the commentary to the Project strives valiantly to show that the same transaction test is an important addition to section 5.01,¹⁶² the Reporters' Notes acknowledge that situations will rarely satisfy the commonality prong but fail to satisfy the same transaction test as well.¹⁶³

158. COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 5.01(a), at 220-21.

159. *See id.* at 225.

160. Thus, an oft-cited formulation of the Rule 20 same transaction inquiry is Judge Aldrich's explanation in *Eastern Fireproofing Co. v. U.S. Gypsum Co.*, 160 F. Supp. 580, 581 (D. Mass. 1958): "[T]here can be no hard and fast rule, and . . . the approach must be the general one of whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend jointly [the several claims] against them"

161. *See* 9 WRIGHT & MILLER, *supra* note 24, § 2382, at 432-33.

162. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 225-27. For example, the commentary cites *Stanford v. Tennessee Valley Auth.*, 18 F.R.D. 152 (M.D. Tenn. 1955), seemingly as an example of a case involving what the Project views as "distinct occurrences" that would not satisfy the same transaction test even though they involve common fact issues. *Id.* at 226. It is true that the court so ruled in that case, but in his treatise on federal practice Professor Miller, one of the Reporters on the COMPLEX LITIGATION PROPOSAL, says of this case that "the holding that joinder was improper seems quite doubtful." 9 WRIGHT & MILLER, *supra* note 24, § 2382, at 433 n.14. Thus the Reporters' own example reinforces the conclusion that the same transaction test really adds nothing.

163. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 228.

4. *A reprise on the standard*

Despite endorsing full-fledged invocation of both the predominance and superiority standards borrowed from Rule 23(b)(3), this section should end with a recognition of the importance of the Project's contribution to resolving the consolidation conundrum. In an aggressively standardless area, the Project has provided an analytical format that identifies and is sensitive to the competing considerations. In order to ensure that the overall standard in fact constrains consolidation decisions, it would be better to fortify it to equal the one in Appendix B. But any sensible standard will have significant flexibility. The recommended one would be neither self-executing nor scalpel-like.

B. *The Panel as Implementor*

Besides articulating a standard for consolidation, the Project seeks to regulate its use by assigning primary, or at least initial, authority for the consolidation decision to the Complex Litigation Panel it proposes to establish.¹⁶⁴ This sort of expanded authority to consolidate for trial has been proposed in the past for the current Multidistrict Litigation Panel,¹⁶⁵ and it seems clearly preferable to the alternatives of conferring the authority entirely on the transferor or transferee judge, or leaving it to the parties' preferences.¹⁶⁶ Placing consolidation authority in the Complex Litigation Panel would mark a change from the current arrangement in which transferee judges often exercise such authority under the guise of 28 U.S.C. § 1404(a). Reliance on the Panel would foster consistency in handling consolidation and ensure that judges fully familiar with the Project's textured consolidation standard would, at least initially, make the decision whether that standard is satisfied.¹⁶⁷

164. For consolidation pursuant to Appendix B, the Reporters propose creation of an Interstate Complex Litigation Panel of state judges. See COMPLEX LITIGATION PROJECT, *supra* note 3, app. B, § 2(a). Although this would be a different entity, the nature of the constraint provided by centralization of authority would be similar. Accordingly, this wrinkle is not treated separately in the text.

165. See Rhodes, *supra* note 152, at 712; Cooney, *supra* note 28, at 611.

166. See COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 64-66.

167. See *id.* at 63 (stating that the Panel would develop "a unique competence" to make this decision, and its involvement would promote predictability).

Sensible though it is, relying on the Panel to decide consolidation issues is not a cure-all for the difficulties that attend consolidation. To begin with, timing creates a serious problem for the Panel. For good reasons, the Panel's decision whether to consolidate should ordinarily be made as early as possible.¹⁶⁸ But at that time there may be significant uncertainty about critical aspects of the litigation that bear on the wisdom of consolidation, so that the Panel will have to rely on an informed guess. The Project's commentary suggests that the Panel can delegate fact-gathering responsibility to a "special master" if it does not know enough about the cases,¹⁶⁹ but this option would rarely be helpful since it would only delay matters. At least one piece of information that is often important—the law to be applied—will by definition be unavailable to the Panel when its consolidation decision must be made. The Project authorizes the transferee judge to select governing principles of law in some circumstances,¹⁷⁰ but of necessity that decision can only be made after transfer. The choice of law decision could, however, have a significant bearing on whether there are common questions, and whether those predominate. More generally, owing to the need to adjust the nature of consolidation in the face of later developments, or to undo consolidation entirely, the transferee judge has authority to reconsider or revise a consolidation order of the Panel.¹⁷¹ Hence, although the Panel should be a better arbiter, it cannot be a final arbiter, and considerable power must continue to reside in the transferee judge.

In addition, there is room for skepticism about the enthusiasm the Panel will bring to some of the consolidation criteria, particularly those that deal with fairness and litigant interests. As noted above, the current Multidistrict Panel has been notably indifferent to Congress' insistence that litigants' interests be a coequal factor in making transfer decision for pretrial purposes.¹⁷² Perhaps there is something in the implicit mission

168. *Id.* § 3.03(a) (stating that the panel should decide on consolidation "as soon as possible" so that parties and court know whether it will occur).

169. *Id.* at 68.

170. *See id.* §§ 6.01-.08, at 321-436.

171. *Id.* at 108. Whether a transferee judge could use § 1404(a) to effect consolidation for trial where the Panel had determined that such consolidation should not occur presents a nice question. It is not clear that such an order would be subject to review by the Panel under section 3.07(b).

172. *See supra* text accompanying notes 151-52.

statement for the Panel that accelerates the tendency Professor Brunet notes to exalt efficiency over litigant interests and other considerations.¹⁷³ A Chief Justice may be expected to select judges for such a Panel who support the idea of aggregated treatment, or at least to pass over judges who are distinctly skeptical about it (if any still exist). The dynamics of the Panel itself may tend to reinforce this likely initial preference for aggregation. Hence, although the Panel would have a "national focus and overview" that would put it in an "optimal position to consider the interests of the entire judicial system,"¹⁷⁴ it is less clear that the Panel would be "relatively neutral in making the transfer for consolidation decision."¹⁷⁵ To the contrary, although the Panel might be expected to approach the selection of a transferee district neutrally, it would probably have a distinct bent in favor of transfer. A transferee judge may similarly approach the transfer/consolidation question with indifference to party interests.¹⁷⁶

In sum, the fact that consolidation decisions are initially to be made by the Complex Litigation Panel does not substantially lessen the need to fortify the standard for consolidation, as urged above. Particularly given the experience under the current Multidistrict Litigation Panel, a clear declaration of the prerequisites to transfer is in order.

C. Fragmentation of Cases

The natural tendency of consolidation toward bifurcation, trifurcation, and beyond would be further fueled were the Project's proposals adopted. The Project's black letter suggests that the transferee judge consider "structuring of the litigation by separating the issues into those common questions that should be treated on a consolidated basis and those individual questions that should not."¹⁷⁷ The Project further directs that

173. See *supra* text accompanying note 149.

174. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 62.

175. *Id.*

176. "The concept of 'convenience of parties and witnesses' takes on an entirely different meaning when a § 1404(a) motion, encompassing tens or hundreds of cases, is brought before a § 1407 transferee court. In such a setting, the interests of the individual litigants are subordinated to the collective good." Rhodes, *supra* note 152, at 741.

177. COMPLEX LITIGATION PROPOSAL, *supra* note 3, § 3.06(a), at 106. Comparable authority is proposed in the Reporters' Appendix B for the transferee state judge who receives cases transferred by the Interstate Complex Litigation Panel.

the transferee judge prepare a plan for the disposition of the litigation that "shall specify whether the entire action or only specified issues shall be determined in the transferee district and also shall provide for the disposition of the issues not to be determined in the transferee court."¹⁷⁸ To implement this trial plan, the judge has "broad discretion" to return "individual issues" to the court from which the case originated or to transfer them to yet another transferee district.¹⁷⁹ When cases are removed from state court pursuant to the Project's new removal jurisdiction, this power to decide which issues will be consolidated for trial could lead to issues in the same case being resolved in different court systems.¹⁸⁰ As we have seen, such fragmented litigation is not cost free.¹⁸¹ But since bifurcation is more a by-product than the primary goal of the Project, it will not be examined in detail here.

The starting point in assessing the bifurcation issue is to recognize that, despite the rather longstanding debate about the desirability of bifurcation under Rule 42(b), there has been rather little direction on when bifurcation should be employed.¹⁸² The Project does not stop at creating expanded authority to fragment cases, however; it also provides a detailed analysis of the issues bearing on the use of the severance power that is unequalled in any similar source. The commentary identifies and addresses several important problems and supplies guidance on dealing with these issues even for those who disagree with the Project's position on some of the problems. Although the best way to obtain insight into the severance issues addressed is to read the pertinent portions of the Project, a canvass here identifies the matters covered.

First, the Project categorizes and chronicles the types of issues that might usefully be severed according to case type. For example, it identifies four determinations that need to be made in "antitrust, securities, products liability and mass disaster litigation," suggesting that general causation and liabili-

See *id.* app. B, § 6(a).

178. *Id.* § 3.06(b), at 106.

179. *Id.* § 3.06(c), at 106.

180. "Section 5.01(c) . . . contemplates intersystem rather than intrasystem bifurcation of a single case before one court." *Id.* at 237.

181. See *supra* text accompanying notes 47-84.

182. See Henderson et al., *supra* note 72, at 1684 ("[O]nly very vague standards exist for determining the appropriateness of a judge's decision to hold a bifurcated trial.").

ty can often be separated from specific causation and damages.¹⁸³ It offers similar analyses of copyright, patent and contract litigation¹⁸⁴ and supports consolidation of punitive damages.¹⁸⁵ It also offers guidance on whether the transferee court should retain or transfer individual issues after severing them.¹⁸⁶

Second, the Project recognizes that severance conflicts with the tradition of a unitary trial and insists that this consequence of severance be considered before the procedure is employed.¹⁸⁷ But it properly goes on to note that the principal problem area for severance is in personal injury litigation and that "[i]ssue severance has operated without any real problem or challenge in the securities and antitrust fields."¹⁸⁸ In the same vein, the Project identifies the prodefendant shift in results that seems to attend bifurcation between liability and damages in personal injury cases¹⁸⁹ and recognizes that there is an "important philosophical issue"¹⁹⁰ about whether the breed of jury nullification of liability rules that seems to occur in unitary trials should be fostered. The Reporters' Notes suggest that, at least in complex litigation, there is no alternative to severance despite the nullification effect.¹⁹¹

Third, the Project identifies the sterile trial problem and explores the Sixth Circuit's grappling with that problem.¹⁹² It suggests that allowing plaintiffs to introduce some evidence of their injuries during the liability portion of the trial could ameliorate the sterile trial problem, although this strategy will not entirely eliminate the problem.¹⁹³ Conceding that the cure is

183. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 114.

184. *Id.* at 114-15.

185. *Id.* at 115. The justification for this position seems essentially substantive—to avoid crippling multiple punitive damage awards against defendants.

186. *Id.* at 126. For example, it observes that "damage issues that are linked inextricably to factual determinations already made in the magnet court sometimes may benefit from being handled by the transferee judge." *Id.*

187. "[I]ssue severance . . . must be undertaken with great care in recognition that it alters the tradition of how cases are decided. Before a court adopts the procedure in a particular case, the possible effects severance may have on the proceedings must be considered." *Id.* at 119-20. For a discussion of these issues, see Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989).

188. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 120.

189. *Id.* at 120-21; see *supra* text accompanying note 82.

190. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 120.

191. *Id.* at 125.

192. *Id.* at 121-23; see *supra* text accompanying notes 73-81.

193. COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 122.

incomplete, the Project nevertheless recommends bifurcation because the advantages are likely to outweigh the disadvantages, and because "judicious use of separate trials is essential to the effective functioning of the jury system."¹⁹⁴ But it cautions that "trifurcation is more questionable than bifurcation."¹⁹⁵

Fourth, it argues that severance will actually improve the fairness of consolidated proceedings by preserving the plaintiffs' control over litigation of individual issues.¹⁹⁶ Of course, severance does involve the left hand giving back some of what the right hand took away, since consolidation caused the loss of control in the first place. Moreover, this restoration of control may be less significant than the Project suggests unless accompanied by a return of the case to the original court, where the lawyers initially retained by the plaintiffs can more conveniently participate.

Fifth, the Project offers some commonsense tips on employing severance. Thus, it suggests that putting simple issues first may avoid undue expense if more cumbersome issues can thereby be avoided.¹⁹⁷ It also suggests that the "judge may empanel multiple juries to see whether" they reach conflicting outcomes in order to protect against the possibility of an anomalous verdict.¹⁹⁸

Finally, the Project proposes to create special appellate avenues to provide early review of certain aspects of severed proceedings, recognizing that special treatment should be accorded severance orders. It would authorize the Complex Litigation Panel to review the transferee judge's orders to transfer issues.¹⁹⁹ Although the Panel's authority does not extend to all severance decisions made by the transferee judge,²⁰⁰ the very existence of review authority recognizes the special impact that

194. *Id.* at 123.

195. *Id.* at 122.

196. *See id.* at 109 ("[A]llowing for consolidation of issues rather than entire claims increases the possibility that the individual litigant will be represented adequately . . . without sacrificing the ability of individual parties to control the litigation of unique issues.").

197. *Id.* at 111.

198. *Id.* at 123.

199. *Id.* § 3.07(b), at 129. The Panel would have discretion not to undertake such review.

200. *See id.* at 137 ("It does not embrace questions regarding possible prejudice or inefficiencies surrounding a decision to have a consolidated trial on a particular issue or to sever certain issues for individual treatment.").

severance decisions can have on cases.²⁰¹ In addition to Panel review of certain severance orders, the Project would authorize immediate review of liability determinations by an appellate court when the question of liability has been separately adjudicated, even though damages issues remain to be determined.²⁰²

Perhaps other, more precise guidelines for severance might be proposed.²⁰³ Certainly transferee judges will have significant latitude in shaping cases, and the Project's overall orientation is sympathetic to the use of transferee discretion. But the commentary does catalogue and take seriously the potential drawbacks, as well as offering some particulars such as the comment that trifurcation is more dubious than bifurcation.²⁰⁴ One idea that might help in the decision to bifurcate, as with the initial decision to consolidate,²⁰⁵ is superiority; the black letter could direct that bifurcation only be used if superior to unitary trial. In a consolidation situation, however, a superiority requirement in the bifurcation analysis would seem to add little to the superiority requisite in the consolidation itself, were that vigorously applied. Neither in Rule 42(b) nor elsewhere in procedural law is there a source for borrowing guidelines on fragmentation as there is in Rule 23(b)(3) for the question of consolidation.²⁰⁶ Accordingly, despite concern about over-fragmen-

201. As the commentary explains:

The potential impact of those decisions warrants an opportunity for discretionary review even though modification is possible. For example, plaintiffs erroneously forced to remain for a consolidated trial in a distant forum may face prohibitive litigation costs, subordination of their individual claims or defenses, or undue delay. . . . Not only would increased costs pose a hardship to plaintiffs, but also they might affect the outcome of the litigation. Plaintiffs unable to bear the financial burden might feel obliged to settle for less than they otherwise might have secured.

Id. at 136.

202. *Id.* § 3.07(c), at 130.

203. Henderson et al., *supra* note 72, at 1694-95, propose that in mass tort cases bifurcation only be allowed when two conditions are satisfied: "First, any issue to be tried separately must be common to all of the claims. Second, the relevant societal interests must clearly outweigh the interests of individual claimants in . . . a single, unified proceeding." But this constraint on judicial decision-making does not seem particularly stronger than the prescription of the Project.

204. See COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 122 ("[T]rifurcation is more questionable than bifurcation.").

205. See *supra* text accompanying notes 146-57.

206. Indeed, the Rule 23 analogy tends, if anything, to undercut the constraints this Article urges for consolidation and bifurcation. Rule 23(c)(4)(A) allows the court to certify a class only "with respect to particular issues," implicitly bifurcating the claims of all class members thereby. Although this issue certification power seems to erode the predominance requirement of Rule 23(b)(3) by allowing

tation of cases, this Article does not propose fortifying the Project's provisions on bifurcation as it does urge for the consolidation standard.

D. The Question Before Congress

By assessing the value of consolidation in dealing with complex litigation, this Article illuminates whether Congress should embrace the Project's effort to facilitate consolidation. Although it urges fortifying the standard for consolidation by making that standard more directly parallel to the handling of class actions under Rule 23(b)(3), on balance the Article finds that the Project provides a thorough and balanced examination of the consolidation conundrum. Does that mean that Congress should embrace the Project's central goal of facilitating consolidation?

The answer is uncertain. For one thing, there are a variety of federalism and other objections to the Project's proposals that other scholars have addressed. Beyond that, there is what might be called empirical uncertainty about consolidation itself. This Article has approached the question almost entirely on the doctrinal level. The issues raised by consolidation that were identified in Part III,²⁰⁷ however, really cannot be quantified in a way susceptible to doctrinal prescription.²⁰⁸ The Project's approach is to identify the issues and propose consideration of them by the Panel and later by the transferee judge. Judges have an experiential basis for such determinations, but one might conclude that their information base is too limited, or that they are too likely to be seduced into disregarding any counterbalances against consolidation in their quest for efficiency and broad-gauge disposition of litigation.

the judge to excise and disregard noncommon issues, we are told that certification of specific issues can be used even if there is only one common issue, and that it should be used in such a circumstance rather than deny class certification. See 7B WRIGHT ET AL., *supra* note 113, § 1790, at 271, 276. The Project notes the similarity of issue severance under Rules 23(c)(4) and 42(b). See COMPLEX LITIGATION PROPOSAL, *supra* note 3, at 117. Were the attitude of severance rather than denial of aggregation borrowed for consolidation, the consequence might be a stronger push toward bifurcation than the Project endorses.

207. See *supra* text accompanying notes 36-91.

208. Compare quantifiable factors such as the amount in controversy in diversity cases. See 28 U.S.C. § 1332(a) (discussing situations "where the matter in controversy exceeds the sum or value of \$50,000").

Under these circumstances, it may not be enough to point out that the Project's effort to overcome the obstacles to consolidation "hardly reflect[s] focused consideration of the desirable scope of possible consolidation."²⁰⁹ Even arbitrary limits can look attractive when they confine a disquieting, unknown force. The Project has not dispelled all misgivings about aggressive use of consolidation and severance of issues. Indeed, to a substantial extent the Project seems tempted to fall back on the argument not that consolidation is desirable, but that it is the only stopgap available to prevent chaos.²¹⁰ That is hardly a positive argument for consolidation and may be insufficient to carry the day for the Project's aggressive reforms designed to make consolidation more readily available.

V. THE ROLE OF THE PROJECT'S CONSOLIDATION PROVISIONS, ASSUMING CONGRESS DOES NOT ACT

The ALI has not had great success in the past in prodding Congress into action. Its 1969 Study of the Division of Jurisdiction Between State and Federal Courts proposed a number of statutory changes, but none were enacted until the Federal Courts Study Committee recommended some of them in 1990.²¹¹ Assuming that Congress responds to the Project as it did to the Study, one would not expect to see the jurisdictional and other innovations recommended by the Project enacted in the near future. These striking ideas about jurisdiction and choice of law will (as did the 1969 Study) serve principally as fodder for law school classes. Some, therefore, criticize the Project because it is directed only at Congress.²¹²

Relegation to law school curriculum need not be the fate of the Project's analysis of consolidation, however. Without any

209. Rowe, *supra* note 105, at 327.

210. *E.g.*, Sherman, *supra* note 117, at 236-37 ("If plaintiffs cannot get their individual cases tried, aggregation may offer the only realistic opportunity for judicial resolution short of settlement.").

211. The Federal Courts Study Committee recommended that Congress amend the general venue statute, 28 U.S.C. § 1391, (a) to place the then-current authorization of venue in the district "in which the claim arose" with language suggested by the ALI study and (b) to eliminate the disparities then allowed between federal cases based solely on diversity and other federal cases. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 89, at 94. Congress so amended § 1391 in 1990.

212. "The Project . . . really poses a working agenda for only one group—Congress." Shreve, *supra* note 9, at 1144.

further action by Congress, as we have seen,²¹³ transfer and consolidation decisions are repeatedly and increasingly made, and related severance orders are often entered. That is the reason why the Federal Courts Study Committee also recommended in 1990 that guidelines for consolidation and bifurcation be promulgated.²¹⁴ Perhaps the Project can be used as a source of the kind of guidance for judges that the Committee desired.

The ALI's work product has proved much more influential with judges than with Congress. Its restatements have proved enormously successful in influencing the law,²¹⁵ sometimes too much so in the view of some critics.²¹⁶ The restatements have become almost an art form that can serve as a vehicle for all purposes.²¹⁷ Like the restatements, the Project may influence judges confronting consolidation decisions even though its jurisdictional and choice of law proposals have not been enacted.²¹⁸ One important influence would be on the members of the current Multidistrict Litigation Panel; in making their transfer decisions under the current statute they could find much of use in the Project's discussion of transfer and consolidation. Similarly, transferee judges could find in the Project exactly the sort of blueprint for handling consolidation and severance decisions that the Federal Courts Study Committee urged. Outside the transfer context altogether, the growing importance of con-

213. See *supra* Part II.

214. See *supra* text accompanying notes 88-89.

215. "As of March 1994, the ALI counted over 125,000 court citations to the restatements. United States Supreme Court Justices invoked the restatements in nine cases during the 1993-94 term. Judges in all fifty states have looked to them." Justice Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute, Address at the University of Wisconsin Law School* (Oct. 28, 1994), in 1995 WIS. L. REV. 1, 4-5 (footnote omitted).

216. See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 511-18 (1985) (arguing that § 402A of the Restatement (Second) of Torts—dealing with strict products liability—was insinuated into the restatement by a cabal of law professors); Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67, 97 (1992) (urging that "ALI publications should not be given precedential effect in any court proceeding unless or until the ALI has been democratized").

217. See, e.g., Gretchen Craft Rubin & Jamie G. Heller, Note, *Restatement of Love (Tentative Draft)*, 104 YALE L.J. 707 (1994).

218. "Even if Congress does not enact it, the Proposed Final Draft will undoubtedly influence judicial opinion for many years to come." Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 844-45 (1994).

solidation and severance of issues provides a ready market for the learning offered by the Project. Unlike the 1969 study of federal jurisdiction, then, the Project may become a vital part of the litigation scene.

Given this prospect, the diversity of consolidation standards contained in the Project is particularly unfortunate. For one thing, the existence of three standards is simply confusing.²¹⁹ More significant, however, is the fact that the Project principally relies on a watered-down shadow of Rule 23(b)(3)'s requirements. At least one may hope that judges will, as recommended in this Article, actually embrace the more vigorous requirements of Appendix B when confronted with the question whether to consolidate cases for purposes of adjudication.

VI. CONCLUSION

Complex litigation sometimes does seem to resemble Wonderland, but consolidation pursuant to Federal Rule 42 presents many more challenges than Wonderland's Rule 42. This Article has tried to demonstrate that the ALI Complex Litigation Project contains important insights on the proper use of consolidation while also criticizing the Project's unwillingness to tighten up the test for consolidation. Given the limited probability that Congress will soon undertake the reforms the Project proposes to foster consolidation, we may hope that the ALI's work in directly confronting the consolidation conundrum will nevertheless serve to improve and focus the judiciary's use of consolidation in the future.

To best fulfill that objective, however, the judiciary should embrace the more forceful provisions of Appendix B rather than the open-textured directives of section 3.01. Whether judges might do so is, at best, uncertain. Not only does adherence to Appendix B exalt the commentary over the black letter, it also cuts against the judicial tendency to maximize the courts' discretion. This temptation to expand discretion may even lead to relaxation of the provisions of Rule 23, from which this Article has borrowed to fortify the Project's proposals. The Advisory Committee on the Civil Rules has for several years been considering changes in the class action rule that would make it more open-textured.²²⁰ If the committee's class action initiatives her-

219. See *supra* note 119 (summarizing the differences in standard between § 3.01, § 5.01, and app. B of the Project).

220. For the text of one such proposal, and a critical analysis, see Robert G.

ald a general trend to relax constraints on aggregation, the prognosis for the Project as a device for confining and focusing the use of consolidation is poor indeed. We may hope that another course will prevail with regard to both class actions and consolidation.